

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>v.</b>	)	<b>Criminal No. 93-3-P-C</b>
	)	<b>(Civil No. 95-204-P-C)</b>
<b>DARYL E. SINGLETERRY,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON DEFENDANT’S AMENDED MOTION FOR  
COLLATERAL RELIEF UNDER 28 U.S.C. § 2255**

The defendant’s motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (Docket No. 52) is before the court on remand from the First Circuit Court of Appeals. He stands convicted of possession with intent to distribute cocaine, and aiding and abetting with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(iii) and 18 U.S.C. § 2, the use and carrying of a firearm in connection with a drug trafficking offense in violation of 18 U.S.C. § 924(c), and deriving certain personal property from proceeds obtained as the result of drug trafficking activity in violation of 21 U.S.C. § 853. I recommend that the motion be granted in part and denied in part without a hearing.

**I. Procedural Background**

Following his conviction at jury trial, sentencing and unsuccessful direct appeal, *see United States v. Singleterry*, 29 F.3d 733 (1st Cir.), *cert. denied*, 513 U.S. 1048 (1994), the defendant filed the instant motion for post-conviction relief on July 5, 1995. I thereafter recommended denial of the motion without a hearing. *See* Recommended Decision on Defendant’s Motion for Collateral Relief Under 28 U.S.C. § 2255 (Docket No. 59). The court adopted my recommendation and judgment

entered accordingly (Docket Nos. 64-65). Following the entry of the recommended decision, but prior to its adoption by the court, the defendant moved for leave to file a “supplemental motion” in support of his bid for section 2255 relief. *See* Motion Requesting to File Supplemental Motion Under 28 U.S.C. § 2255 (Docket No. 62) at 1. The defendant sought thereby to add additional grounds for post-conviction relief, one of which was based on the Supreme Court’s decision in *Bailey v. United States*, 116 S.Ct. 501 (1995). The court did not consider these additional grounds in adopting the recommended decision and, subsequent to its order denying post-conviction relief, denied the motion for leave to file a supplemental motion.

On appeal, the First Circuit determined that it was an abuse of discretion for the court to have denied the section 2255 motion without having first resolved the motion to supplement.<sup>1</sup> In so holding, the First Circuit expressed concern about the defendant’s ability to raise his *Bailey* argument in light of the amendments to section 2255 contained in the Antiterrorism and Effective Death Penalty Act (“Antiterrorism Act”), Pub.L. 104-132, § 105, 110 Stat. 1220-21 (Apr. 24, 1996). The Antiterrorism Act limits second or successive section 2255 motions to grounds involving certain newly discovered evidence or “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” *Id.* Expressing no view as to the merits of the *Bailey* claim, but as a means of assuring its consideration, the First Circuit deemed it appropriate to require the court to consider the defendant’s request to amend his original request for post-conviction relief.<sup>2</sup>

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<sup>1</sup> The order of the Court of Appeals appears in the record as Docket No. 74.

<sup>2</sup> Accordingly, the First Circuit also denied a separate application for authorization to file a second or successive motion under section 2255. *See* Order of Court (Docket No. 75).

On remand, this court clarified the status of the proceeding as follows: It granted the defendant's original motion to supplement his initial section 2255 filing, *see* Docket No. 62 (endorsement of May 8, 1997), it granted a renewed motion to supplement filed in February 1997 by the defendant subsequent to the First Circuit's remand, *see* Docket No. 76 (endorsement), but it denied as "unnecessarily repetitious" another motion to supplement the defendant filed in April 1997, *see* Docket No. 78 (endorsement). In response to a request for further clarification by the government, the court thereafter directed the government to respond to the defendant's first supplemental memorandum of law in support of his amended motion (Docket No. 84), which bears an August 1996 date but was docketed by the court on May 8, 1997, and the defendant's second supplemental memorandum, which bears no date but was also docketed on May 8, 1997. *See* Order (Docket No. 85). The government has filed its response and the matter is now in order for decision.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citations omitted). In this instance, with the one exception discussed *infra*, the defendant's allegations would, if accepted as true, not entitle him to relief, and his motion is thus amenable to dismissal without a hearing.

## **II. *Bailey v. United States***

In *Bailey*, the Supreme Court clarified the meaning of the word "use" in 18 U.S.C. § 924(c)(1), which criminalizes the use or carrying of a firearm in connection with crimes of violence or drug-trafficking offenses. *Bailey*, 116 S.Ct. at 503, 505 ("defining "use" in section 924(c)(1) as

“active employment of [a] firearm” making it “an operative factor in relation to the predicate offense”). The government now concedes that the defendant’s conviction under section 924(c)(1) cannot stand in light of *Bailey*, and that resentencing is appropriate as a result. I therefore so recommend.

### **III. Non-Constitutional Claims**

The next two claims raised in the defendant’s first supplemental memorandum do not require extensive discussion. The defendant contends (1) that the court erred at his sentencing in calculating the total quantity of drugs involved in the case and (2) that he was improperly sentenced because the government failed to prove that the substance involved in his case was crack cocaine as defined in the U.S. Sentencing Guidelines. These are claims that could have, but were not, raised on direct appeal. Because they do not involve constitutional or jurisdictional issues, and because there are no exceptional circumstances<sup>3</sup> beyond the mere existence of allegedly erroneous findings at sentencing, relief under section 2255 is unavailable to the defendant on these claims. *See Knight v. United States*, 37 F.3d 769, 772-73 (1st Cir. 1994). Moreover, as the government points out, the defendant’s second contention would fail in any event because his original sentencing antedates the amendment to the U.S. Sentencing Guidelines on which the argument relies. *See U.S. Sentencing Commission Guidelines Manual*, Appendix C, Amd. 487 at 304 (providing that, effective Nov. 1, 1993, “cocaine base” for purposes of Guideline sentencing means “crack” rather than other substances that are “scientifically . . . a base form of cocaine”); *David v. United States*, 1998 WL 21848 at \*4 (1st Cir.

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<sup>3</sup> The only possible exception relates to the defendant’s contention, made separately in his second supplemental memorandum, that he was deprived of the effective assistance of counsel during the trial and appellate phases of the underlying proceeding. This issue is discussed *infra*.

Jan. 27, 1998) (substantive changes in Guidelines generally not applied retroactively, in contrast to “clarifying” amendments); *United States v. Booker*, 70 F.3d 488, 489-90 (7th Cir.1995) (characterizing amendment 487 as a substantive amendment); *United States v. Kissick*, 69 F.3d 1048, 1053 (10th Cir.1995) (same); *see also United States v. Lopez-Gil*, 965 F.2d 1124, 1134-35 (1st Cir. 1992) (on rehearing) (holding, prior to amendment 487, that “cocaine base” does not necessarily include only crack cocaine for purposes of section 841 or Sentencing Guidelines); *United States v. Rostoff*, 53 F.3d 398, 406 (1st Cir.1995) (deeming an amendment to be substantive when it is at odds with prevailing circuit precedent).

#### **IV. *United States v. Davis***

The final contention in the defendant’s first supplemental memorandum relies on *United States v. Davis*, 864 F.Supp. 1303 (N.D.Ga. 1994), in which the District Court for the Northern District of Georgia invalidated the provisions of 21 U.S.C. § 841 that provide for enhanced penalties when the subject offense concerns cocaine base as opposed to simply cocaine. The *Davis* opinion contains two distinct holdings: (1) that an ambiguity in the statute required the court to apply the “rule of lenity” and ignore what amounted to a “scientifically meaningless” distinction between crack cocaine and cocaine base, *id.* at 1305-09, and (2) that any statutory distinction between “crack cocaine” and “cocaine base” is irrational and thus inconsistent with the constitutional guarantee of equal protection, *id.* at 1308-09 & n. 25. Concerning the former, the Supreme Court has made clear that the “rule of lenity” is a “principle of statutory construction,” *Bifulco v. United States*, 447 U.S. 381, 387 (1980) and thus not grounded in the Constitution. Thus, to the extent the defendant intends to invoke the rule of lenity here, he is foreclosed from doing so for the same reasons that his other

non-constitutional claims are precluded. If, however, the defendant is seeking to make an equal protection argument, all that need be said is that the issue has been previously decided against him on direct appeal and may not be revisited on collateral attack. *See Singleterry*, 29 F.3d at 741; *Tracey v. United States*, 739 F.2d 679, 682 (1st Cir. 1984) (“Issues disposed of on a prior appeal will not be reviewed again by way of a 2255 motion.”) (citation omitted).

## **V. Ineffective Assistance of Counsel**

Finally, the court confronts the allegations contained in the defendant’s second supplemental memorandum. The defendant contends therein that he was deprived of the effective assistance of counsel, and thus suffered the deprivation of rights secured to him by the Sixth Amendment, during the pretrial, sentencing and appellate phases of the underlying proceeding.

As the defendant notes, the applicable rule is stated in *Strickland v. Washington*, 466 U.S. 687 (1984).

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Id.* at 687. Measured against this standard, it is clear that the defendant’s allegations concerning ineffective assistance do not entitle him to post-conviction relief.

The defendant’s first contention is that his trial counsel failed to conduct an adequate investigation into whether the substance possessed by the defendant was actually crack cocaine within the definition of “cocaine base” that subjected him to an enhanced penalty pursuant to section

841(b).<sup>4</sup> In response, the government correctly points out that prior to the promulgation of Amendment 487 the law in the First Circuit was that “cocaine base” within the meaning of section 841(b) included but was not limited to crack cocaine. *Lopez-Gil*, 965 F.2d at 1134-35. Thus, any failure by defense counsel to conduct a thorough investigation into whether the defendant possessed crack, as opposed to some other form of cocaine base, does not meet the prejudice prong of the *Strickland* test.

The defendant next contends that his trial counsel was ineffective by simply accepting as true certain statements made by the officers who arrested the defendant and by failing to interview witnesses to the arrest. Missing is any indication of what such investigation would have revealed and, thus, how the defendant was prejudiced. Therefore, the allegations concerning counsel’s alleged failure to investigate are too vague and conclusory to trigger further review here. *See David*, 1998 WL 21848 at \*6 (to trigger right to hearing, post-conviction petitioner “must do more than proffer gauzy generalities or drop self-serving hints that a constitutional violation lurks in the wings”).

Concerning the sentencing phase, the defendant contends that his attorney was ineffective by failing to challenge the government’s calculation of the drug quantity involved, which was based in part on a determination that seized proceeds accounted for 67.2 grams of crack cocaine, out of 73.66 grams overall. *See* Government’s Sentencing Memorandum (Docket No. 41) at 10-11; Memorandum of Sentencing Judgment (Docket No. 46) at 1 (accepting the total figure of 73.66 grams). The record belies this contention. The sentencing memorandum submitted by defendant’s

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<sup>4</sup> The question of whether the substance involved was crack cocaine, as distinguished from ordinary cocaine, was relevant at the sentencing phase rather than at trial, where the question for the jury was simply whether the substance at issue was some mixture containing cocaine. *See United States v. Munoz*, 36 F.3d 1229, 1238 (1st Cir. 1994).

trial counsel forcefully objects to the calculation of the drug quantity involved specifically because the government failed to meet its burden of proof concerning the 67.2 grams traceable to drug proceeds. *See* Defendant's Memorandum of Law in Aid of Sentencing (Docket No. 44) at 1-2. Further, counsel raised at the sentencing hearing the precise issues the defendant now contends that counsel failed to recognize: that a crucial aspect of the government's calculation was based on uncorroborated testimony concerning statements made to police by the defendant concerning the drug transactions involved. Transcript of Proceedings (Docket No. 49) at 225.

Finally, the defendant contends that counsel was ineffective at the appellate phase of the underlying proceeding by failing to raise the issues discussed above concerning the relationship between drug proceeds and the amount of drugs used to determine his sentence as well as the issue of whether he was amenable to sentence enhancement because he possessed cocaine base. This contention may be rejected without a hearing because, for the same reasons the defendant has failed to demonstrate their outcome-determinative significance at the trial level, he has not demonstrated that failure to present the issues at the appellate level meets the prejudice prong of the *Strickland* test. *See Scarpa v. Dubois*, 38 F.3d 1, 13-14 n.7 (1st Cir. 1994) (contrasting failure to press particular arguments on appeal with complete failure to perfect appeal, in which prejudice is presumed) (citations omitted).

## **VI. Conclusion**

For the foregoing reasons, and for the reasons set forth in my original Recommended Decision dated January 26, 1996, I recommend that the defendant's motion for post-conviction relief be **GRANTED** to the extent that he seeks resentencing in light of *Bailey v. United States* and



otherwise **DENIED** without a hearing.

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 25th day of February, 1998.*

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*David M. Cohen  
United States Magistrate Judge*